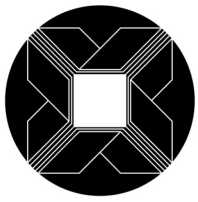

April 22, 2005

Mr. Jeffrey Kovar
Assistant Legal Advisor for Private International Law
U.S. Department of State
2430 E Street, NW
Suite 203, South Building
Washington, DC 20037-2851

Dear Mr. Kovar:

Re: Draft Hague Convention on Exclusive Choice of Courts Agreements

This letter is written on behalf of the American Association of Law Libraries, the American Library Association, and the Association of Research Libraries. (A description of our associations is attached.) As you know, the library community has been following the development of this Convention for several years because of the importance of jurisdictional matters, particularly those concerning contracts and intellectual property rights. We appreciate the opportunity to participate in the upcoming meeting of the Secretary of State's Advisory Committee on Private International Law. In anticipation of that meeting, we here briefly set forth our views on the current draft Convention.

Libraries negotiate contracts for goods and services every day. In doing so, we are able to ensure that the contract terms to which we agree will take into account our mission to the public as well as our business and institutional needs, and that those terms comply with other legal requirements (e.g., state legal requirements for state institutions). Increasingly, though, contracts for information goods and services are non-negotiated instruments, and we expect this trend to continue. (Even now, for many libraries, especially smaller ones, non-negotiated licenses represent the bulk of their transactions.) The growing use of non-negotiated contracts presents serious issues for libraries, ones that could be greatly exacerbated by the draft Hague convention. Our concerns are shared by many other educational, research, and cultural organizations with which we collaborate regularly and with businesses, as well.

In particular, libraries fear that shrink-wrap, browse-wrap, and click-on licenses for information products will increasingly contain terms that will prohibit uses permitted by the U.S. Copyright Act, such as the making of copies for preservation, inter-library loan, or other fair use

purposes. U.S. courts might rule that these terms are preempted by the Copyright Act or are unenforceable because the licensee did not manifest assent to the agreement. However, if a content provider pursues a breach of contract action against a library in a foreign court pursuant to a choice of court clause in the license, the foreign court might conclude that these terms are enforceable. And a U.S. court might then be obligated under the Convention to enforce the judgment.

As we have stated previously in our comments, we appreciate your efforts to have the current draft include more specific language, particularly in Articles 5 and 7, but we believe that inadequacies remain. Under Article 5, a court in the designated forum can decline jurisdiction only if the choice of court agreement is "null and void" under the law of that State. Article 7 contains more expansive grounds for a court in another forum to exercise jurisdiction, but the public policy exception is still too narrow and vague: "giving effect to the agreement would lead a *very serious* injustice or would be manifestly contrary to *fundamental* principles of public policy." (Emphasis supplied.) Similarly, Article 9's public policy basis for a court to decline enforcement of a foreign judgment is also too stringent and indefinite: "recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State."

Even if the ambiguities in these escape clauses were eliminated, however, they would remain insufficient and unreliable ways of addressing the manifest unfairness of allowing one party to a contract to mandate - with no opportunity for negotiation - which court shall have jurisdiction to hear and settle disputes between the parties. As noted above, it is conceivable that a U.S. court will feel obligated to enforce a judgment rendered by a foreign court designated in a choice of court agreement, when the U.S. court considering the merits of the dispute would have reached a different result. Moreover, even if the substantive terms of the agreement are not problematical, the non-drafting party to a non-negotiated contract should not be forced to go to a distant court to resolve the dispute. Although freedom to contract is a valued principle in our nation's legal system, the very nature of such contracts is that there has been no "meeting of the minds" as we usually think of it.

At the March meeting of the Advisory Committee, a number of other organizations, including some representing intellectual property owners, such as the International Trademark Association, stated that they too think that non-negotiated contracts do not qualify as "arms-length" or "between consenting adults" and should not be covered by the convention. There are several possible ways to address the problem.

First, in previous rounds of negotiations, the libraries have suggested revisions to the escape clauses that would make it clear that choice of court clauses in non-negotiated contracts are not enforceable where the agreement "has been obtained by an abuse of economic power or other unfair means." This approach is similar to that contained in Article 40(2) of GATT-TRIPs, which provides that "[n]othing in this agreement shall prevent Members from specifying in their national legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market."

Second, we have suggested previously that choice of court clauses in non-negotiated contracts with certain institutions should not be automatically enforced, through an exception along the following lines:

> Agreements conferring jurisdiction and similar clauses in non-negotiated contracts with non-profit, non-commercial organizations, including non-profit libraries, archives, and educational institutions, shall be without effect.

(If we recall correctly, at least one other Member Country delegation made a similar suggestion at the December 2003 special meeting in The Hague.)

A third option came out of the recent March meeting. One organization, which we understand has since backed away from its proposal, suggested that the convention could apply only to negotiated agreements and include a definition that: "An agreement can be defined as negotiated where both parties have had the opportunity to affect the terms of the agreement." Though some participants in the meeting objected to such an approach, others supported it and, therefore, we urge that the May 9th meeting include a serious discussion of this option. (A definition along these lines could fit into one of several places in the draft Convention, for example, in Article 1 (scope), Article 2(2)(k) (exclusion of intellectual property matters), or Article 3 (defining exclusive choice of court agreements).) We would note that the failure to address similar concerns about non-negotiated contracts contributed in no small way to the near universal rejection of the Uniform Computer Information Transactions Act (UCITA), a proposed state contract law.

Finally, disputes relating to copyrights or related rights could be excluded from the Convention, except as they arise in a proceeding as an "incidental question" (Art. 2(3)).

When the draft Convention was much broader in scope, and would have dealt broadly with issues of jurisdiction in tort disputes as well as contract disputes, libraries as well as some other organizations had urged that the Convention not apply to copyrighted matters. Although most national intellectual property laws are designed to be in conformance with broad international agreements, the national laws differ substantially, particularly in their treatment of fair use and other legal exceptions that are critical to the work that we do. Furthermore, there was the concern that libraries and schools could be required to defend themselves against infringement claims in courts far removed from their normal residence. The principal issue then (in addition to the concerns with contracts, as set out above) was whether the selection of jurisdiction could undermine protections built into national copyright laws.

Once the draft Convention was considerably narrowed in 2003 to apply only to business-to-business contracts, including those governing copyrighted works, libraries focused our efforts instead on trying to find a way for courts in Member States to have some leeway in asserting (or declining) jurisdiction when the "choice of court" term appears in a non-negotiated contract. If non-negotiated contracts are not excluded from the scope of the Convention and there are no meaningful "escape clauses," then libraries have no choice but to return to our earlier position that copyright matters be excluded from the scope of the Convention along with other intellectual property matters.

Failing any of the above solutions, we renew our request to exclude non-profit, non-commercial organizations (such as non-profit libraries, archives, and educational and other cultural institutions) from the Convention's application altogether, such as has been done in Article 2(1)(a) with consumers.

Sincerely,

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The American Association of Law Libraries (AALL) is a nonprofit educational organization with over 5,000 members nationwide. AALL's mission is to promote and enhance the value of law libraries to the legal and public communities, to foster the profession of law librarianship, and to provide leadership in the field of legal information and information policy. http://www.aall.org/

The American Library Association (ALA) is a nonprofit educational organization of over 65,000 librarians, library trustees, and other friends of libraries dedicated to improving library services and promoting the public interest in a free and open information society. http://www.ala.org/

The Association of Research Libraries (ARL) is a nonprofit organization of 123 research libraries in North America. ARL's members include university libraries, public libraries, government and national libraries. Its mission is to shape and influence forces affecting the future of research libraries in the process of scholarly communication. ARL programs and services promote equitable access to and effective uses of recorded knowledge in support of teaching, research, scholarship and community service. http://www.arl.org/